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19 April 2019

By Email Only

Marc Zeppetello
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San Francisco Bay Conservation and Development Commission
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Subject: *Comments On Proposed Rulemaking To Amend Permit Application Fees*

Dear Mr. Zeppetello:

I write on behalf of a large residential developer client to comment on the proposed rulemaking to amend BCDCC's permit-application-fee regulations, at 14 California Code of Regulations, Division 5, Appendix M.

The proposed permit-fee regulations tie permit application fees to "total project cost", even if some or most of a project is outside BCDCC's jurisdiction. The proposed regulations define "Total project cost" as "all expenditures ... for ... all aspects of the project *both inside and outside the Commission's jurisdiction*". (Appendix M, paragraph (d), emphasis added.) The proposed regulations cite no authority justifying charging for work done outside BCDCC's jurisdiction. This proposal to charge fees for work outside BCDCC's jurisdiction raises serious statutory, constitutional, and economic problems.

Statutory Concerns

BCDCC's jurisdiction is largely prescribed, and circumscribed, by the McAteer-Petris Act. That Act generally requires permits for development "within the area of [BCDCC's] jurisdiction". (Gov. Code § 66632(a).) That Act authorizes BCDCC to require "a reasonable filing fee and reimbursement of expenses for processing and investigating a permit application". (Gov. Code § 66632(c).) It is not reasonable to require applicants

to pay fees for development within BCDC's jurisdiction that are tied to the value of development outside BCDC's jurisdiction, or that value (for purposes of the fee calculation) development outside BCDC's jurisdiction equally to development within BCDC's jurisdiction. The permit fee schedule needs to be rethought to comply with the McAteer-Petris Act.

Constitutional Concerns

The proposed new fees also raise constitutional concerns. The U.S. Constitution requires that conditions associated with land-use permits, including fees, have a nexus with, and be at least roughly proportionate to, the impacts the project may have. (*Dolan v. City of Tigard* (1994) 512 U.S. 374, 391; *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, 837; see *Koontz v. St. Johns River Water Management Dist.* (2013) 570 U.S. 595, 626 (Kagan, J., dissenting) (*Nollan/Dolan* principles now apply to "permit conditions requiring monetary payments").) Calculating fees based on a project's impacts outside BCDC's jurisdiction does not bear any nexus or rough proportionality to the project's impacts within BCDC's jurisdiction. The proposed regulation violates the U.S. Constitution.

The California Constitution, in Article XIII A § 3 also prohibits the State from imposing any "tax" (defined as any "charge") that exceeds the "reasonable costs to the State of providing the service". (See also *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 671 (land-use "fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development").) It is not reasonable for BCDC to charge applicants permit fees for development outside BCDC's jurisdiction. The proposed regulation violates the California Constitution.

Economic Concerns

The notice of the proposed rulemaking states that the new regulations would not have any significant effect on housing costs, and identifies no adverse economic impacts. But charging housing developers significant permit fees for development done outside BCDC's jurisdiction is going to make housing development more

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expensive to build, thus discouraging new housing construction and making what housing is built more expensive. These unacknowledged economic impacts will be significant.

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Thank you for considering these comments.

Sincerely,

BRISCOE IVESTER & BAZEL LLP

/s/ Peter Prows

Peter S. Prows

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John A. Coleman
Chief Executive Officer

April 17, 2019

San Francisco Bay Conservation and Development Commission
455 Golden Gate Avenue, Suite 10600
San Francisco, CA 94102

RE: Proposed Rulemaking to Amend Permit Application Fees

Dear Chair Wasserman and Commissioners:

Bay Planning Coalition is a non-profit, policy advocacy organization with over 150 members across a range of industries who collectively advocate for strong economic growth while protecting the environmental sustainability of the region. Our members recognize the importance of the Bay Conservation & Development Commission's (BCDC) critical role in preserving and enhancing the San Francisco Bay ecosystem, and we understand the need for appropriate funding to achieve that mission. However, our members are concerned about the staff recommendation to double permit application fees due to the impact it would have on future restoration and development projects around the region and that BCDC fees are based on project cost, which inherently tracks with overall economic costs in California.

Our members are concerned that there is currently insufficient information available to evaluate the proposed doubling of permitting fees, in particular because the additional revenue received from any increase would go directly to the State with no guarantee of increases in funding to BCDC. Prior to approving any permit fee increase, our members urge BCDC staff to undertake a review of the permitting program that would identify existing inefficiencies in the permitting process overall. These inefficiencies have direct impacts on projects across the region, and on public agency, non-profit, and private applicants. For years, permittees have been subjected to onerous procedures that have resulted in unnecessary and costly delays in projects, and the enforcement policies have dissipated resources far beyond what is necessary for permit compliance. Our members would consider supporting a fee increase if it were accompanied by a commensurate exercise to improve efficiency and reduce current costs on the permit processing and enforcement side. For example, we would request the Commission to direct staff to bring back a proposal that would reduce staff costs associated with the permit processing program by at least 15%, before moving forward with any action on the fee increase. We also respectfully request that you delay the consideration of this item until the state audit of your agency has been completed and reviewed internally and externally, which may reveal opportunities to reduce costs associated with the permitting process.

Bay Planning Coalition is eager to be a supportive partner to help identify opportunities to streamline the permitting and enforcement processes so important waterfront projects throughout the Bay Area can move forward in a timely and cost-effective manner. We look forward to working with you on this task.

Sincerely,



John A. Coleman
Chief Executive Officer



April 16, 2019

San Francisco Bay Conservation and Development Commission
455 Golden Gate Avenue, Suite 10600
San Francisco, CA 94102

RE: Proposed Rulemaking to Amend Permit Application Fees

Dear Chair Wasserman and Commissioners:

Thank you for the opportunity to provide input into the proposal to increase permit fees at the BCDC. This letter is being submitted by the SF Bay Stewardship Alliance. First, we believe while the new fee structure appears reasonable given the comparisons, we also believe several important issues must be addressed during this public input period as part of any fee increase.

1. First, we believe NO ACTION should be taken on the permit fee structure until the pending report from the California State Auditor covering BCDC activities has been received and reviewed by the BCDC Commissioners and the public AND appropriate reforms as a result of the review are in place.
2. It would appear the rationale for seeking an increase in fees is because the Department of Finance suggested it—this in turn because BCDC continues to overrun its budget. Does the Department of Finance in making this suggestion satisfy criteria under the Office of Administrative Law criteria? There is no useful analysis of "where and why" on the fees, just doubling everything, which is a serious error.
3. BCDC has created many costly and time-consuming problems due to badly written permits and poor administrative processes. This leads to gross inefficiencies and seem intended to create enforcement opportunities. If applicants are to pay double the current fees, how does BCDC propose to improve its permit process and reduce the need for multiple amendments and other wasteful enforcement actions? We find no scenario which could justify the current backlog of over 250 enforcement actions, representing a majority of major permittees. The permit process clearly is flawed.
4. Any change in fee structure should be accompanied by modernizing the BCDC permit process. We support the reform of the permitting process suggested by the Bay Planning Coalition, Sustainable Waterfronts Committee dated November 21, 2017. The white paper and eight concrete recommendations can be found at:

http://bayplanningcoalition.org/wp-content/uploads/2017/11/BPC-White-Paper_11212017-final-draft.pdf.

5. In analyzing the merits of a fee increase, one must look at both sides of the equation: **fees**, and the **costs** the fees are intended to offset. In the case of BCDC, the cost side is out of control. BCDC generate hundreds of meaningless actions with permittees, resulting in many permit amendments, numerous enforcement actions, and massive legal fees to justify, restate and try to justify trivial claims.
6. More than a half-century ago, the McAteer Petris Act set a minimum \$20.00 cost to trigger an action (intended to control sand and shell mining in the Bay). BCDC has expanded its interpretation to *“any improvement exceeding \$20 requires authorization”*. (To quote on staffer, *“you need our authorization to move a potted plant”*). This is a meaningless amount in 2019 and serves only to generate *paper violations* which cause no harm the environment nor impact public access. They *do* serve to dissipate money and time which could be productively used, costing both the agency and permittees millions of dollars with no benefit. BCDC in updating its fees should at the same time increase the trigger a project amount from \$20.00 to a reasonable number (perhaps \$20,000) before authorization or permits are necessary. It is nonsense for the permit process to cost tens of thousands of dollars for an action as simple as replacing a \$200 gate or light fixture.
7. All government--local, state or federal--cares about effective AND efficient public administration; without it, we don't have an embodiment of the public policies set. The original mission of BCDC is a public policy triumph over conflicting regional development policies, but requires a strong foundation of public administration. Current BCDC practices have led to waste, abuse and bad governance. BCDC is also quite inefficient. Using BCDC's sister agency for comparison, the California Coastal Commission is far more efficient, spending approximately **\$1.24** per foot of California shoreline annually (with a budget of \$22.4 M), and by most accounts is doing a better job. BCDC by comparison spends **\$11.30** for every foot of Bay shoreline annually (\$8M budget). This is *ten times more expensive for the same job* (based on public USGS and NOAA data of actual shoreline). Its noteworthy that BCDC publishes its own shoreline data and claims it is responsible for 50% of California's shoreline, an astonishing and grossly misleading overstatement! And the number of Coastal Commission amendments and enforcement actions are dwarfed by those of BCDC.
8. The comparative data BCDC used to determine if the fees are comparable to other jurisdictions only compare “new construction”. What would the data show if it included remodels and “minor” repairs? In addition, the determination of fees did not include actual conversations with those who determine the fees in the other localities, a poor process.
9. The methodology of determining if BCDC hits the goal of 40% of cost recovery uses a five-year average in collection of fees, but only using the highest annual total

regulatory program cost. The criteria should be the same for both, otherwise it is setting up a situation where BCDC will always be below their 40% fee revenue goal.

10. The fee issue is another example where BCDC has not been doing their job. According to the report BCDC failed to do a review of fees in 2013. Also, BCDC is under an audit and losing court cases for its failed Enforcement process. When will the Commission recognize that it is responsible *for its staff, not to its staff*, and a leadership change is urgently needed?
11. BCDC receives consistency determinations submitted by federal government agencies under the Coastal Zone Management Act but does assess fees. Shouldn't this work be deducted from the total regulatory program cost; otherwise local agencies are subsidizing the federal government.
12. Currently, local governments pay the same fees as the private sector. There should be no changes in this rule as it would create a real conflict with the Commissioners who represent local government.
13. Nowhere in the literature for the fee increases is there a clear definition of "Administrative" versus "Major" Permits. How is this determined? Who determines it and is there an appeal process?
14. Have these fees and this process been submitted and reviewed by the Office of Administrative Law?

In Summary:

- No action on fees should be taken until the report from the California State Auditor has been received and recommendations reviewed and implemented.
- BCDC fee increases must correspond to the costs of associated with actions justifying the fees. A \$20 bar is far too low, and should be revised to a meaningful amount.
- Improvement in staff efficiency will improve the fiscal responsibility of BCDC far more than fee increases.
- Streamlining the permitting process should be part of any changes in fee structure. This is fertile ground for correcting the budget failures, and reflects the fact that a majority of staff activity has no relevance to damage (or benefit) to the environment or public access, its primary charter, and calls for an overhaul of practices and policies. It cannot make sense to spend tens of thousands of hours and dollars over the size and color of chairs, the number of gates in a safety fence, the number of irrigation sprinklers, "illegal doggie bag dispensers", or parsing a single allegation into many for the simple purpose of racking up fees, to cite just a few very public bad examples.

We look forward to an open public debate as the Commissioners implement fee and permitting reforms.

Regards,

A handwritten signature in blue ink, appearing to read 'Bob Wilson', with a stylized, cursive script.

Bob Wilson

Co-Founder

SF Bay Stewardship Alliance

www.baystewards.com

CC: Senator Jerry Hill, Speaker Pro Tempore Kevin Mullins, California State Auditor